IN THE
SUPREME COURT OF THE UNITED STATES

No. 954

ALASKA STEAMSHIP COMPANY, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO BRIEF OF THE UNITED STATES IN OPPOSITION

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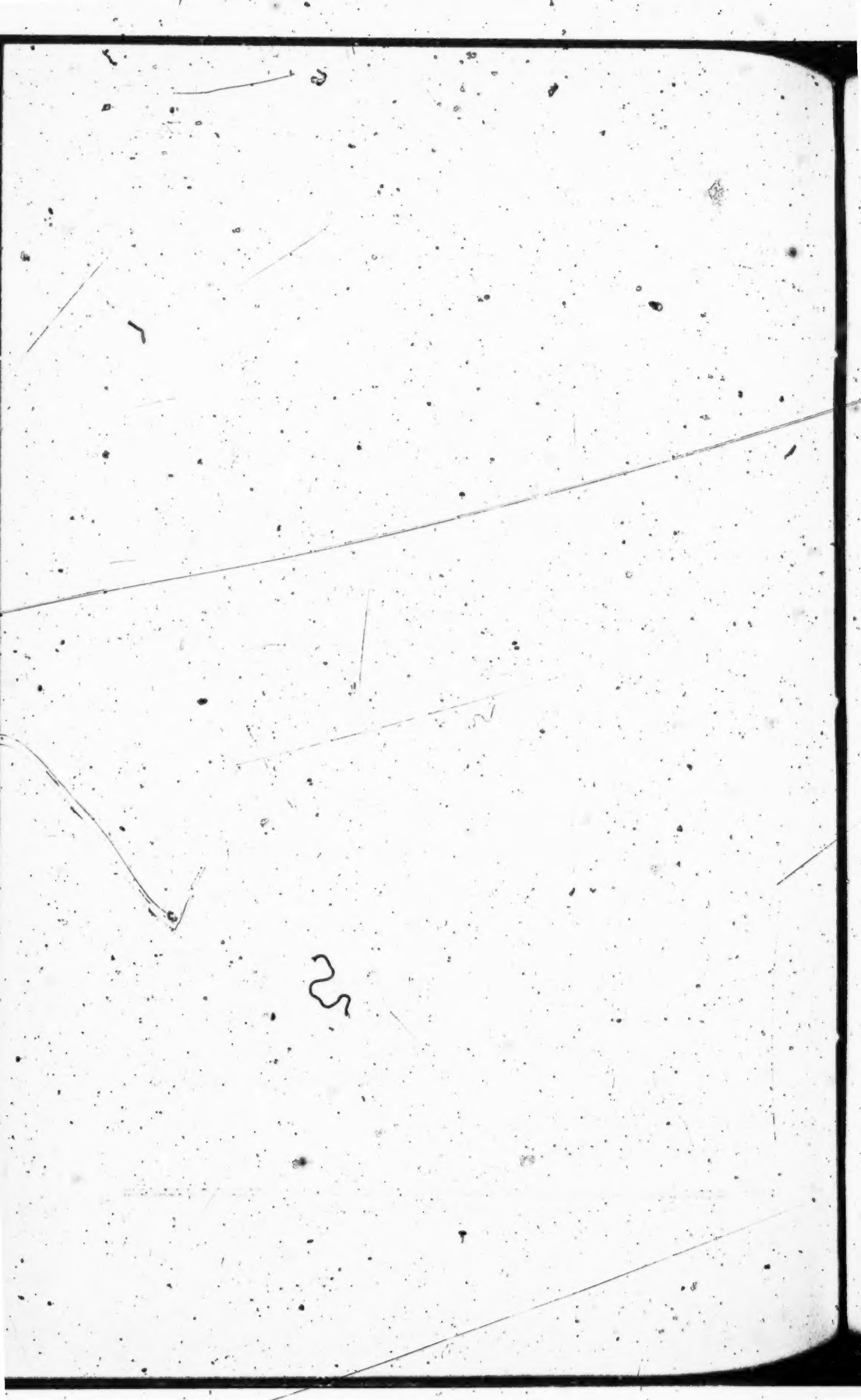

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REASONS FOR SUPPLEMENTAL BRIEF

The brief for the United States is addressed solely to an issue which was not discussed in petitioner's brief, thus leaving the argument confused. This confusion arose in the following way:

There was but one issue in the case before the District Court: *Was the petitioner-shipowner obligated to return to the port of shipment the shipwrecked crew of its own vessel or did the obligation rest upon the government to pay for the return of the seamen in pursuance of the Shipwrecked Seamens' Certificate?*

The facts were not in dispute. The legal question at issue was clearly presented by demurrer. The District Court held, on demurrer, that no obligation rested on

the petitioner to return its seamen, and that an action would lie to recover the compensation (1930 A. M. C. 1907). When the case was tried, although all alleged facts were proved, and the respondent offered no evidence whatsoever and moved to dismiss, the District Court in effect reversed itself and held that petitioner, under the Shipping Articles, had to return shipwrecked seamen to port of shipment (R. 51-54; 60 F (2) 135) and could not recover compensation for so doing.

On appeal to the Circuit Court, there was only the one above issue before the court until the respondent in its answering brief for the first time challenged the applicability to Alaska of the statutes involved. A second issue was therefore raised: *Did Customs officials in Alaska have authority to issue shipwrecked seamens' certificates authorizing transportation of shipwrecked seamen to port of shipment and payment of compensation in accordance with the certificate?*

In disposing of these two issues, the Circuit Court held as to the first that no obligation rested on the shipowner to return its shipwrecked seamen to port of shipment, but as to the second issue affirmed the decree of dismissal *on the sole grounds that the statutes in question did not apply to Alaska* (R. 69-78; 63 F (2) 398).

Petitioner's opening brief is, therefore, addressed solely to this latter issue, but the respondent in its answering brief ignores this issue and addresses itself to the original issue regarding the obligations of a shipowner to a shipwrecked crew, in respect to which petitioner has no brief before this court. The following is, therefore, respectfully submitted.

ARGUMENT

I. OBLIGATIONS OF SHIP OR SHIPOWNER TO SHIPWRECKED CREW; CONTINENTAL AND ENGLISH MARITIME LAW AND USAGE.

II. OBLIGATIONS OF SHIP OR SHIPOWNER TO SHIPWRECKED CREW; AMERICAN LAW AND USAGE.

1. American Legislation.

2. American Decisions; Statutes Construed.

I.

From very early times it has been the rule that freight is the mother of wages; if no freight was carried the seamen received no wages. This rule was applied by the courts with great leniency against the seamen, "the wards of the admiralty," and even modified in cases where freight was lost and seamen saved any part of the wreck. The rule no longer applies in this country, but irrespective of the rule it is not now and never has been in this country or in Europe, the duty of the master or shipowner to return the crew to the home port in cases of shipwreck. From earliest records until the present day, shipwreck terminates a voyage. It is a risk that the seamen must take.

The following relevant excerpts from leading maritime authorities herein submitted are only persuasive authorities for the foregoing statement. As stated by Mr. Chief Justice Telghman in *Morgan & Price v. Ins. Co. of North America* (1807), 4 Dall. 455, 1 L. Ed. 907, cited in 30 Fed. Cas. 1203, in regard to the codes hereinafter quoted:

> "They and the commentators on them have been received with great respect both in the courts of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our own country, they are not to be regarded, but on points which have not been decided they are worthy of great consideration."

The point here involved has not been decided except in the instant case.

According to the Amalphitan Code, the Code of the city of Amalphi, one of the chief commercial cities of Italy from the 9th to the 11th Century, and a maritime power of importance, the rule was as follows:

> "Likewise if after the vessel has departed, she is captured or breaks up, the mariner ought to be paid for the time which he has served up to the time of the shipwreck, and if he has to refund pay, he cannot be constrained to do so for the period of a month computed from the day before the shipwreck, notwithstanding that he is paid by the month." (Article 52, Chapters and Ordinances of the Maritime Code of the Noble City of Amalphi, 1010 A. D.)

An ordinance passed in the reign of King John of England about 1200 A. D., based upon the Laws of Oleron, provides for getting the seamen to land, but only if they aid in salvage work, as follows:

> "If a shyp perysshe in any place the maryners ought to save the moost parte of the goods in the shyppe, and in so doying the marster ought to gyve them theyr costes reasonably to goo to lande, if they have saved so moche that the mayster may do it. And the master may lay to pledge of the saved goodes to some honest man for them. And yf he can not help them so, he is not bound to reward them, but they too lose theyr rewardes whan the shyp is lost."

The laws of the Town of Wisbuy, 1219 A. D., in dealing with the subject of shipwreck (Ch. XII, Sec. 2; The Black Book of Admiralty, Vol. IV, p. 403,) provide:

> "And the seamen shall not separate from the shipmaster all the while that they can help the ship or the goods or the tackle; should goods be salved, the use of them pertains to those whose property they are, unless there should have been an agreement otherwise. And the seaman must follow to the next land or town or village, in order that the seaman may take leave of the shipmaster. And should the shipmaster have received half his freight or less, the seaman is entitled to half his wages; and should the shipmaster have received above half his freight, the seaman shall have his full wages."

An excerpt from The Purple Book of Bruges (1350-1380), giving the Flemish version of the early laws of the sea upon the point in question and based upon an early text of the Rolls of Oleron, goes a step further in providing as follows, in Article 17:

> "Should a ship be wrecked in any country that may be, the ship's crew are bound to save the most they can, and should they help the master, he is bound to them for their services; and should he have no money, from that which they have helped to save he is bound to convey them back to their country; and should they help him not, he is not bound to them and they shall lose their wages, since the ship is lost." (The Black Book, Vol. IV, p. 303).

According to the famous marine ordinance of Louis XIV (1681), Book III, Title 4, Articles VIII and IX, it is provided:

> "VIII. In case the ship be taken, or suffer shipwreck, and ship and goods be entirely lost, the seamen shall pretend to no wages; but they shall not

however be obliged to restore what has been advanced to them.

"IX. If some part of the ship be preserved, the seamen shall be paid the wages that are due to them out of the wreck they have preserved; and if there be only goods saved, the seamen, even those that are engaged by the freight, shall be paid their wages by the master, proportionably to the freight he receives; and whatever way they be hired, they shall be over and above paid for the time they are employed in saving the wreck and goods."

Frederick Jacobsen, famed German advocate, in his "Law of the Sea," translated from German (1815), quotes the German rule as follows, at page 143:

"If the vessel is captured, or wrecked and goes to pieces, so that the vessel and cargo are totally lost, the mariners are entitled to no wages. However, they are not bound to return what they have received in advance. If any part of the vessel is saved; the crew, whether engaged for the voyage or by the month, are to be paid from the materials of the wreck which they have saved."

In the same volume, at page 144:

"According to Dutch, Swedish and Hanseatic Codes, seamen who engage in salvage are entitled to receive a reasonable compensation. But if nothing remains from what is saved, over and above salvage money, no further demands can be made for wages in arrear."

In Molloy's "De Jure Maritimo et Navali" (1744), the earliest outstanding English survey of admiralty law, it is stated at page 249:

"That if the ship do not return, but perishes by tempest, enemy, fire, etc., the mariners shall lose their wages; for if the mariners shall have their wages in these cases they will not use their best endeavors nor hazard their lives to preserve the ship."

1 Sidney 179.

Abbott, Lord Tenterden, in his "Law of Shipping," the English authority of the 19th Century (American edition, 1854, edited by Mr. Justice Storey), says, at page 780:

> "The payment of wages is generally dependent upon the payment of freight. If the ship has earned freight, the seamen who have served on board the ship have in like manner earned their wages and as in general, if a ship destined on a voyage out and home has delivered outward bound cargo but perishes in the homeward voyage, freight for the outward voyage is received. So in the same case, the seamen are entitled to receive their wages for the time employed on the outward voyage, and the unloading of the cargo, unless by the terms of their contract the outward and homeward voyages are consolidated into one."

Marsden, in his "Digest of Shipping, Admiralty & Insurance Law," on page 107, states:

> "The shipowner gets no freight unless the ship unloads, and the seamen lose their wages."
>
> *The Lady Durham*, 3 Haggard, Admiralty Reports 196;
>
> *Thomas v. Hogan*, 3 Haggard, Admiralty Reports 197, note.

It will be seen from these provisions that the issue was strictly confined to the mariners right to wages upon shipwreck of the vessel. Nowhere in the foregoing authorities is it suggested that the shipowner is obligated to return shipwrecked seamen to the port or land of shipment, except for the limited provision that should the mariners assist in salvaging any portion of the ship and cargo, the master should aid them by means of the funds

derived therefrom, in getting back to land, and even to their country.

II. OBLIGATIONS OF SHIP OR SHIPOWNER TO THE CREW UPON SHIPWRECKED CREW; AMERICAN LAW AND USAGE.

1. American Legislation

At the time of the Declaration of Independence the Colonies already had their admiralty courts by virtue of commissions from the Crown. The Colonies practically adopted the jurisdiction of the colonial vice admiralty courts for their own (Hughes, Admiralty Law, 1920, p. 9), and existing rules of maritime law and usage. The following statute of Virginia adopted in 1779, typifies the acts of the Colonies at this time in providing that the admiralty courts—

> "* * * shall be governed in their proceedings and decisions by the regulations of the Congress of the United States of America, by the acts of the general assembly, by the Laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and of nations."

Seamen were of vital importance to our country at this early period and the Federal Government saw to it that seamen stranded abroad were returned to this country. The following provision is found in the Acts of the first session of Congress, Statutes at Large, Vol. I, §1, Ch. 24, 1792, p. 256, being §7 of "An Act Concerning Consuls and Vice-Consuls":

> "And be it further enacted that to protect the mariners and *seamen employed in vessels belonging*

to citizens of the United States in cases of shipwreck, sickness or captivity, from suffering in foreign ports, it shall be the duty of the consuls and vice-consuls, respectively, from time to time to provide for them in the most reasonable manner, at the expense of the United States subject to such instructions as the Secretary of State shall give and not exceeding an allowance of twelve cents to a man per diem, and all the masters and commanders of vessels belonging to citizens of the United States and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board their ships or vessels at the request of said consuls or vice-consuls, respectively, and to transport them to the port in the United States to which such ships or vessels may be bound free of cost or charge, but that the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several ability; *provided* that no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every 100 tons burthen said ship or vessel on any one voyage, and if any such master or captain shall refuse the same on the request or order of the consul or vice-consul, said captain or master shall forfeit and pay the sum of Thirty Dollars for each mariner or seaman so refused to be recovered for the benefit of the United States by the said consulate or vice-consulate in his own name, in any port of competent jurisdiction."

Unless compensation for the shipowner was provided in the regulations of the Secretary of State, it was clearly contemplated that shipwrecked seamen should work their way home on American vessels, and the penalty for refusing to take them was $30 per man. This Act was repealed however by §5 of the Act of February 28, 1803, U. S. Statutes at Large, Vol. 2, p. 204, and §4 thereof was substituted for the above quoted section of the Act of 1792.

The new section was in substance almost identical with the repealed section, except that masters of American vessels were bound to transport destitute seamen:

> "* * * on such terms not exceeding $10 per person as may be agreed upon between the said master or consul or commercial agent * * * and if any such captain or master shall refuse the same on the request or order of the consul or commercial agent, such captain or master shall forfeit and pay the sum of $100 to each mariner or seaman so refused."

Section 3 of the Act of 1803 provided as follows:

> "Whenever a ship or a vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged, or when a seaman or a mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to pay to such consul, vice-consul or commercial agent for every seaman or mariner so discharged being designated on such list as a citizen of the United States, three months' pay over and above the wages which may then be due to such mariner or seaman, two-thirds thereof to be paid by such consul to each seaman so discharged upon his engagement on board of any vessel to return to the United States, and the other remaining third to be repaid for the purpose of creating a fund for the payment of the passages of seamen citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute and may be in such foreign ports, and the several sums repaid to such funds shall be accounted for with the Treasury every six months by the persons receiving the same."

Although the protection and care of destitute seamen in foreign ports was meticulously provided for in this Act and the obligations of the shipowner defined in respect

to payment of wages where the seaman is discharged because of the sale of a vessel in a foreign port, and although the laws were passed in the face of existing maritime law and usage which, as pointed out in the preceding section, did not impose upon the shipowner the obligation to return mariners to their port of shipment, *no provision whatsoever is embodied in the Act requiring the shipowner to return shipwrecked seamen.* The above quoted §4 of the Act of February 28, 1803, will be found in substantially the same language and unmodified in effect in Revised Statutes, §4577, U. S. C. A., Title 46, §678, and Revised Statutes, §4578, U. S. C. A., Title 46, §679.

Parsons, Professor of Law at Harvard, in "A Treatise on Maritime Law" (1859), at page 458, says:

> "The right of the sailor to be brought back to his home is very jealously guarded by our laws. Every ship must be provided with the shipping articles and a shipping list, verified under the oath of the master; this he is required to present to the consul or commercial agent of the United States at every foreign port which he visits when so requested, and is under bond to deliver to the boarding officer at the first home port which he reaches, and to produce the persons named therein, that it may be ascertained that he has his whole crew on board. If it appears that any of them are missing, he must account for their absence. If he discharges any of them abroad with his, or their own consent, he must pay to the American Consul of the port (or commercial agent) over and above the wages then due, three months' wages, of which two-thirds are paid to the seaman and one-third retained by the consul and remitted to the Treasury of the United States to form a fund for the maintenance of seamen abroad and for bringing them home. *If*

the discharge is caused by any disaster which breaks up the voyage, so that the ship cannot be repaired and the voyage resumed in a reasonable time and at reasonable cost, the above requirement does not apply to it."

The Act of June 7, 1872, Ch. 322, §33, 17 Stat. 269, specifically terminated the obligation of the shipowner to pay wages after the shipwreck of the vessel:

> "In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period."

In 1898 this provision was amended (Act of December 21, 1898, Ch. 28, §3), by adding the following provision:

> "Such seamen shall be considered as destitute seamen and shall be treated and transported to the port of shipment as provided in §§4577, 4578 and 4579 of the Revised Statutes of the United States." (Now §§678, 679 and 681, Title 46, U. S. C.)

By the addition of this latter provision in 1898, Congress could scarcely have been more specific in its intention as to the treatment of shipwrecked seamen. If there were any doubts as to how they were to be returned home after the wreck of their vessel and the termination of their wages in pursuance of the Act of 1872, they were dispelled completely by the Act of 1898. As has already been pointed out, the sections referred to, namely Revised Statutes, §§4577, 4578, and 4579, §§678, 679 and 681, Title 46, U. S. C., are the provisions of the Act of February 28, 1803, as amended to date, and they provide specifically for the transportation of shipwrecked seamen at the expense of the Government.

Revised Statutes, §4579; §681, Title 46, U. S. C., derived from the Act of 1803 (2 Stat. 261), was passed July 31, 1894, and was undoubtedly intended to fill in a gap in the existing statutes by providing for the relief of seamen in foreign ports when no consular officer of the United States could assist them under the foregoing provisions. This section provides:

> "Whenever distressed seamen of the United States are transported from foreign ports where there is no consular officer of the United States, to ports of the United States, there shall be allowed to the master or owner of each vessel, in which they are transported, such reasonable compensation, in addition to the allowance now fixed by law, as shall be deemed equitable by the Comptroller General of the United States."

Throughout this entire period, while the Government changed and amended its laws governing the rights of seamen in distress in foreign ports to maintenance and return to the United States, the objective of the Government was not only to insure humane treatment of American seamen, but to protect the interests of the Government in securing the employment of seamen upon American vessels. As stated by Mr. R. B. Taney, in an opinion rendered on November 3, 1931, as Attorney General of the United States (Opinions of the Atty. Gen. II, p. 468), in passing upon the rights of the captain of a vessel to claim compensation for returning a stranded seaman to the United States when the seaman had left the ship before the voyage was completed:

> "The seaman is sent to the United States, not only as an act of justice to him, but also because the public interest requires that he should not be dis-

> charged and set on shore in a foreign port, where he might be tempted to enter into foreign employment, and his services lost to his country. This latter object, which forms one of the chief inducements of the government to pay for his passage, is entirely defeated when the seaman is not actually brought to the United States, * * *."

Without tracing in chronological detail the further developments of the statutes here in question, it is sufficient to say that the entire law relative to the mutual rights and duties between the shipowner and the crew and the obligations of the United States Government, was revised and restated in the Act of December 21, 1898, Chap. 28 (30 Stat. 755). There are twenty-six sections in this Act of which six deal with the matter of securing for the seamen the right to transportation home or satisfactory employment on another vessel from a foreign port. It is obvious that these six sections were intended to cover every circumstance under which a seaman would leave or become separated from his vessel in a foreign port. They may be summarized as follows:

1. Where a seaman leaves a vessel because she was previously sent to sea in an *unseaworthy state by neglect or design of the owner.* (§11). (Revised Statutes, 4561; §658, Ch. 18, Title 46, U. S. C.)

2. Where a seaman is discharged because his *vessel is sold abroad* (§17). (Revised Statutes, §4582; §684, Ch. 18, Title 46, U. S. C.)

3. Where a seaman leaves because the *voyage is continued contrary to agreement* (§18). (Revised Statutes, 4583; §685, Ch. 18, Title 46, U. S. C.)

4. Where a seaman leaves because the *vessel is badly provisioned or unseaworthy* (§18). (Revised Statutes, 4583; §685, Ch. 18; Title 46, U. S. C.)

5. Where a seaman leaves because he had had *cruel treatment* (18). (Revised Statutes, 4583; §685, Ch. 18, Title 46, U. S. C.)

6. Where a seaman leaves because he has been *accused of insubordination* (§21). (Revised Statutes, 4522; §703, Ch. 18, Title 46, U. S. C.)

7. Where a seaman is discharged because his *vessel has been lost or wrecked* (§3). (Revised Statutes, 4526; §593, Ch. 18, Title 46, U. S. C.)

8. Where a seaman is *discharged because he is incapacitated* for further service on the vessel by illness or injury (§16). (Revised Statutes, 4581; §683, Ch. 18, Title 46, U. S. C.)

In the first six of these cases, the obligation was definitely imposed upon the master of the vessel and therefore upon the shipowner, to provide the seaman with passage or secure employment for him on another vessel. The Consul was made the judge of the facts as to the sufficiency of the seaman's grounds for leaving the ship, and is in all cases charged with the duty of seeing that the master and shipowner fulfill their obligation to the seaman. In the seventh and eighth cases the obligation was imposed upon the Government, the seventh case being embodied in §3 of the Act (Revised Statutes, §4526), and restated entirely from the old enactment discussed above, as follows:

> "In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled for wages for the time of service prior to such termination, but not for any further period. Such seaman shall be considered a destitute seaman and shall be treated and transported to port of shipment as provided in §§4527, 4578 and 4579 of the Revised Statutes of the United States."

In conclusion of this review of the history of the foregoing sections at issue which reveal the unmistakable intent of Congress to impose upon the Government the responsibility of returning shipwrecked seamen, the report of the Committee on the last quoted section is submitted as practically conclusive of this intent:

> "R. S. 4526 now provides that where a seaman is wrecked abroad before the termination of his voyage, he shall be entitled to his wages up to the time his services terminate, but nothing more, from the master or owner. * * *
>
> "This section is the present custom in most cases where the shipwrecked seaman depends on the consul to send him home, though in cases where the seaman has wages coming to him he is usually required to turn them in toward meeting the expenses of his passage home. The British law is based on the theory that where, by an act of God, the sailor is left in a foreign land, the Government should bring him home. Such is the theory of this section. This section and others are drafted with a view to treating seamen on American vessels as Americans in fact, or as such prospectively through naturalization."

2. American Decisions; Statutes Construed

In an early American decision entitled *Henop v. Tucker*, Case No. 6,368, 11 Fed. Cases 1139, C. C., S. D., N. Y., 2 Paine 151 (the date of the case not being given although it apparently falls between 1827 and 1840, the inclusive dates of Paine's reports), two seamen filed libels against Henop as owner of a brig for recovery of two months' wages claimed to be due on their discharge from the brig at Cork under the Act of 1803 (2 Stat. 203) quoted supra. The vessel had been damaged at sea and upon

being surveyed at Cork was abandoned to the underwriters, the repairs necessary being estimated at five-sixths of the value of the ship. As to whether or not the vessel came within the category of wrecks or had merely been voluntarily sold, thereby entitling the seamen to additional wages, the court said at page 1140:

> "I am not aware of any direct decision upon this point, either in the English or American courts. No case has been referred in the English or American courts. No case has been referred to on the argument where it has been expressly adjudged. The question must, therefore, be decided upon general principles, growing out of the contract of seamen for wages. *It is admitted to be the settled rule, that in case of shipwreck, when there is a total physical destruction of the vessel, this will dissolve the contract for wages; but it is said, that when there is only a technical total loss, the contract is not ipso facto dissolved. I am not aware of any case where such a distinction has been intimated; and I cannot discover any solid grounds upon which it can be maintained.* * * *
>
> "*But where the voyage is broken up without any fault of the master or owners, by perils of the sea or a vis major, against which they could not guard, and by reason whereof no further beneficial service could be rendered by the seamen in navigating the vessel, no injustice is done the seamen in such case, if, according to the principles of the maritime law, this is understood to be a contingency upon the happening of which the contract for wages is dissolved, according to the true intent and understanding of the parties.* It certainly cannot be maintained that a seaman is, in all cases, entitled to receive his full wages, when the voyage is broken up without any fault or misconduct chargeable upon him."
>
> *The Saratoga*, Fed. Case 12,355 (1814), 21 F 476.

A similar suit was brought in the case of *The Dawn*, Fed. Case No. 3,665, 7 Fed. Cases 200 (1839), in which

case there is a second decision, Case No. 3,668, 7 Fed. Cases 204 (1841). Plaintiff was paid to the time of discharge when the ship was condemned and sold in Bermuda. Here again the principal question was whether the vessel was damaged by perils of the sea to an extent which made her sale a necessity or whether she was merely sold for the best interests of the owners. After quoting the Act of 1803, requiring payment of three months' wages on the discharge of seamen in a foreign port where the vessel is sold by the owner, two months' wages to go to the seaman and one month's pay to be retained by tne Government to make a fund for the relief of seamen, the court said at page 202, speaking through Mr. Justice Ware:

> "If it had been the intention of the legislature to comprehend cases of a forced and necessary dissolution of the contract, as by shipwreck, capture, seizure and forfeiture of the vessel without the fault of the master or owners, or by any fortuitous occurrence against which human foresight and power could not provide, we should have expected some words would have been used indicative of such an intention. * * * It is not gratuitously to be supposed that the legislature intended to raise a fund even for charitable purposes, by a tax on calamity and misfortune. * * * "

And again at page 204, after examining into the character of the maritime contract of employment and the application of the ordinary rules of contract thereto, the court said:

> "*Upon the general principles of the contract of hiring, the hirer is not responsible when the performance of the contract on his part is rendered impossible by an accident of major force; for no one*

> *is responsible for fortuitous events, unless he takes these risks upon himself by the express terms of the contract.* The construction which has been put upon the statute is in this particular conformable to the general rule of law; it is that the statute does not extend to a case where the sale of the vessel is rendered necessary by such an accident, and of course in such a case the statute damages are not due."

The second decision in *The Dawn* reviews thoroughly the authorities of early maritime law and usage as set forth in the first section of this brief, and the court recognizes the old rule indicated in Section I hereof, that the crew are entitled to compensation if they save the ship, or to payment of their expenses home out of the proceeds.

See also—

Hoffman v. Yarrington (1867), Case No. 6,580, 12 Fed. Cases 307.

In the case of *Drew v. Pope* (1871), Case No. 4,080, 7 Fed. Cases 1071, a similar question is involved, a vessel having been disabled by a typhoon and having put back to Hong Kong where she was sold because it did not pay to repair her. After citing the case of *The Dawn*, supra, and reiterating its recognition of the old rule that the crew were entitled to compensation for salvaging the vessel, the court then said, at page 1073:

> "At the time this decision was rendered, the Act of August 18, 1856, had not been passed. By that Act it is expressly provided, that in cases of wrecked, or stranded vessels, or vessels condemned and sold as unfit for service, no payment of extra wages shall be required (11 Stat. 62). *In this Act, and the Act of 1840, to which it is an amendment, the attention of Congress was specially directed to the subject of*

securing to seamen discharged abroad the means of returning to their homes. * * *

"*It may therefore be justly concluded that Congress, in this class of cases, intended to exempt the master from the duty of providing means for the return of the seamen;* and, if so, the provision in question must be taken as repealing or superseding the rule of the maritime law, as declared by Mr. Justice Ware, even if such a rule had theretofore been recognized and established in our jurisprudence."

Similarly in the case of *Gallagher v. Murray*, Case No. 5,193, 9 Fed. Cases 1087 (1879), a vessel which had not completed its voyage, due to having struck upon a rock, was abandoned as being too badly damaged to repair. The court said, at page 1087:

"*Wreck, stranding or other fatal disability to the ship is recognized as discharging the contract between the ship and the seamen;* * * *."

The case of *Kelly v. Otis* (1885), 23 Fed. 903, gives a clear and decisive interpretation of the statute here construed. The vessel sailed from Minatitlan for the port of New Orleans, encountered heavy head seas and storms which so damaged the vessel that she was compelled to put back to the port of departure. A survey was held and it was found that the vessel could be repaired only at exorbitant expense which would far exceed her value when completed. The vessel was accordingly sold under the authority of the consul. Members of the crew sued for three months' advance pay, for $25 expense in getting passage home, and for $10 expense of board in the foreign port while waiting to get passage home. In sustaining the decree of the District Court dismissing the libel, the Circuit Court said, at page 905:

"The general maritime law which, in a case of *seminaufragium*, or where the vessel was condemned and sold as too unseaworthy to be repaired, gave discharged seamen passage home, and wages up to the time of reaching home, *is unquestionably affected and modified by the statutes of the United States, which provide for all cases of discharge of seamen in foreign ports, and, in case of destitute seamen, their return home by the consular agents of the United States at the expense of a fund derived from the one-third of the three months' extra wages, collected by the consul or agents from all American ships discharging seamen in foreign ports, except where ships are stranded or wrecked, or condemned as unfit for service.* * * *

"Entertaining these views of this case, it follows that the extra wages demanded must be refused, because the schooner was condemned in a foreign port as unfit for sea service, and the demand for expenses in returning home incurred by libelants must be rejected because no fraud nor bad faith existed on the part of Otis, considering him as the responsible owner." (Italics ours).

The cases reviewed above were cited in the decision. A later case bearing upon this same subject is the case of *The Edna* (1923), 291 Fed. 379, construing Revised Statutes §4526; Title 46, §593, U. S. C., a case in which the vessel had been lost to the owners by reason of her capture. The court said, at page 380:

"The service of libelants terminated on January 27, 1916, by reason of the loss of the vessel to her owners, due to her capture by the British as a prize. Libelants thereafter performed no service, and so far as appears left the owners to contest the capture as best they could. *They were then under the statute destitute seamen, and entitled under the foregoing section to transportation to the port of shipment.*" (Italics ours).

The latest case is that of *The Eastern Glen*, 1932

A. M. C. 133 (So. D., N. Y.), a case which falls within the eighth class of seamen destitute in foreign ports as provided by the Act of 1898 reviewed above, namely cases in which seamen are discharged because incapacitated for further service on the vessel by illness or injury. On account of the serious condition of the seaman the plaintiff's shipowner transported him to New York with a doctor and a nurse to accompany him, at an expense of $4,754.77. The plaintiff brought suit against the Government based on the proviso of §683, Title 46, U. S. C., providing that the cost of maintenance and return to the United States should be borne by the United States in such cases. The court held that this section had to be construed with §§678, 679 and 680 of Title 46, U. S. C., which require that the consul shall make all arrangements for the transportation, agreeing with the master of the vessel as to the compensation to be paid therefor, as was done in the instant case. The court said in conclusion:

> "Inasmuch as the requirements of §§678, 679 and 680 have never been complied with, the disbursements of the plaintiff must be deemed voluntary, and as such not recoverable."

It will be noted that the decision is not predicated upon the ground that the ***shipowner was obligated to bring the seamen back*** to the United States, but solely and exclusively upon the ground that ***requirements of the above cited sections had not been complied with.*** In this case the requirements of these sections have been completely satisfied (Ex. 7, R. pp. 31-37, 40).

Numerous decisions of the Comptroller General refusing the allowance of compensation to a shipowner

who had brought his own crew back to the United States, were based upon similar grounds, namely non-compliance with the above cited sections. In the case of *The Pennsylvania*, 3 Comp. Gen. Rep. 148, the Pacific Mail Line took the crew of the PENNSYLVANIA, destroyed by fire in a port of Chile, on board the URBUBAMA, another vessel of the same line, no certificate being issued by the American Consul as required by Revised Statutes §4578, Title 46, §679, U. S. C. As the Comptroller correctly stated at page 149, the above section—

> "* * * provides as conditions precedent to payment from public funds for the subsistence and transportation of destitute seamen to the United States: (1) That the consul or vice-consul shall request the transportation; (2) that the consul and master of the transporting vessel shall agree within maximum limits on the cost of transportation; and (3) that the consul shall issue destitute seamen certificates for the transportation."

After considering the facts, the Comptroller General stated, at page 150:

> "There was no agreement between the consul and the master as to the cost of transporting the seamen, nor were destitute seamen certificates issued by the consul for the transportation and subsistence; nor is the claim within the spirit of the law, no intention appearing therein to reimburse the owner of a lost ship for expenditures made in transporting its own seamen to the United States.
>
> "As soon as the owners of a wrecked vessel take up the burden of subsisting and transporting the members of the crew they cease to be destitute seamen on the hands of the consul and claimant may not be reimbursed from public funds for any part of the cost to it of the transportation and subsistence

expenses of the crew of the steamship PENNSYLVANIA to a port in the United States."

As is correctly stated in respondent's brief, other decisions of the Comptroller are to the same effect (3 Comp. Gen. (1924) 575; 4 i. d. (1924) 118; i. d. (1924) 252; i. d. (1924) 340; i. d. (1924) 483; i. d. (1924) 542; i. d. (1925) 632; 5 i. d. (1926) 623; 6 i. d. (1927) 723; 8 i. d. (1928) 211), all of which are executive and not legal opinions. Furthermore, they do not, as contended by the respondent, represent a construction placed upon the statute in question by a department charged with its administration. The Department of Commerce and not the Treasury Department is charged with the administration of the statutes here involved. The Comptroller General has himself recognized this by saying in 4 Comp. Gen. Rep. 252, at 253:

> "*While the duties of consular officers with respect to the enforcement of the rights of the seamen and the liability of the vessels or their owners are not primarily for the determination of this office* except insofar as it affects payments made by such consular officers from public funds, you are advised, * * *."

The Department of Commerce has regularly and consistently recognized that the *destitute status of seamen is established at shipwreck.* Thereafter seamen are charges of the government to be sent home at its expense upon the issuance of a shipwrecked seaman's certificate. The doctrine that the shipowner still remains under an obligation to the seamen to bring them back to port of shipment, has been engrafted onto the law by the Comptroller General himself, in the face of the history of maritime law on this point, briefly reviewed in the first section of

this brief, and in face of the foregoing decisions by American courts, squarely holding that the seaman's contract is terminated.

But, disregarding the law, what are the logical consequences of the Comptroller's position? He concedes that the compensation which this action was brought to recover would be paid—and that such compensation has been regularly paid for over thirty years for transporting shipwrecked crews from the Alaskan ports to the United States, *if the owner of the transporting vessel does not also own the wrecked vessel.**

But why should the government pay any shipowner if the obligation rests upon the owner of the wrecked vessel to take its crew home? If such an obligation exists, must not the owner of the wrecked vessel either send a ship to bring the crew back, or at least pay compensation to another who discharges the obligation for him?

The Comptroller apparently limits his doctrine to cases in which the owner of the wrecked vessel happens to have a vessel available to bring the shipwrecked crew back. If this be true, how near to the stranded crew must the vessel be before the obligation "takes hold" requiring it to pick up the destitute seamen in satisfaction of the owner's obligation.

And lastly, will the statutory compensation be paid if the vessel, rendering the service, is partially and not wholly owned by the owner of the wrecked vessel, and if so, should not payment be made only in proportion

*It was even proved in this case that the petitioner herein had, in three instances, been paid compensation for transporting to Seattle the crews of its own wrecked vessels, and the Findings of Fact so show (R. 45), contrary to the statement in respondent's brief, page 6, footnote 2.

to the interest of the other owners? By what method and by whom will the ownership of the vessel rendering the service be determined?

It is believed that these questions sufficiently expose the absurdity of the Comptroller's position. It is respectfully submitted that District Judge Neterer was correct in his decision on demurrer when he said (1930 A. M. C. 1907):

> "Shipowners whose vessels are wrecked all stand in the same relation and have the same right under the statute * * *,"

and that the Circuit Court of Appeals, although in error in affirming the decree of dismissal on other grounds, was entirely correct in holding that ownership was not material if the right of recovery was otherwise present (R. 78).

Respectfully submitted,

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